NO. 80-584

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CATHERINE WALSH, widow of Russell A. Mierl, Individually and as Administratrix of the estate of her minor child, EDITH MIERL, et als.
Petitioner

VERSUS

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION AND LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' minor children are all students who attended various Lutheran elementary schools in the New Orleans area and who upon graduation from eighth grade in their respective elementary schools, matriculated to the ninth grade at Lutheran High School, the only Lutheran High School in the New Orleans area. Upon entering ninth grade, each of these children, as well as each child enrolled in the ninth grade at Lutheran High, was declared ineligible to compete in interscholastic sports for a period of one year by the Louisiana High School Athletic Association, which ruled that these children had "transferred" to schools outside their assigned "districts" in violation of the Association's "transfer rule." "Districts" are established by the Association on the basis of public school locations without any regard for the location of parochial schools, and there is no Lutheran Elementary School in the same "district" as Lutheran High School.thus *all* children seeking to continue this Lutheran education from elementary to high school are penalized by the arbitrary application of this rule. It should also be noted that the High School Athletic Association recognizes parish (county) wide attendance "districts" for public high schools with special programs, but refuses to recognize the Lutheran elementary schools as feeder schools for the Lutheran High School. The questions presented here relate to the burden which the application of the transfer rule places upon petitioners' and their children's free exercise of religion, their right of due process, and their guarantee to equal protection under the law. Those questions are whether the application of the "transfer rule" to plaintiffs' children in the present circumstances

(a) Constitutes an undue burden on their free exercise of religion in violation of the First Amendment to the Constitution?

(b) Constitutes an abuse of the due process requirements of

the Fourteenth Amendment to the Constitution?

(c) Violates the Equal Protection clause of the Fourteenth Amendment to the Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, MRS. CATHERINE WALSH MIERL, el als, individually and as administrators of the estates of their minor children, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 30, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported appears at Appendix A, *infra*, pp. A-1 through A-22. The opinion of the United States District Court for the Eastern District of Louisiana, 428 F. Supp. 1261, appears at pp. A-23 through A-44.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 7, 1980. The petition for rehearing and rehearing *en banc* was denied by order dated June 23, 1980. This petition for certiorari was filed less than ninety days from the entry of the judgment in the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners' minor children are all students who attended various Lutheran elementary schools in the New Orleans area and who upon graduation from eighth grade in their respective elementary schools, matriculated to the ninth grade at Lutheran High School, the only Lutheran High School in the New Orleans area. Upon entering ninth grade, each of these children, as well as each child enrolled in the ninth grade at Lutheran High, was declared ineligible to compete in interscholastic sports for a period of one year by the Louisiana High School Athletic Association, which ruled that these children had "transferred" to schools outside their assigned "districts" in violation of the Association's "transfer rule." "Districts" are established by the Association on the basis of public school locations without any regard for the location of parochial schools, and there is no Lutheran Elementary School in the same "district" as Lutheran High School, thus *all* children seeking to continue this Lutheran education from elementary to high school are penalized by the arbitrary application of this rule. It should also be noted that the High School Athletic Association recognizes parish (county) wide attendance "districts" for public high schools with special programs, but refuses to recognize the Lutheran elementary schools as feeder schools for the Lutheran High School. The questions presented here relate to the burden which the application of the transfer rule places

upon petitioners' and their children's free exercise of religion, their right of due process, and their guarantee to equal protection under the law. Those questions are whether the application of the "transfer rule" to plaintiffs' children in the present circumstances

(a) Constitutes an undue burden on their free exercise of religion in violation of the First Amendment to the Constitution?

(b) Constitutes an abuse of the due process requirements of the Fourteenth Amendment to the Constitution?

(c) Violates the Equal Protection clause of the Fourteenth Amendment to the Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent parts as follows:

> ". . . No State shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners filed this case originally in the United States District Court for the Eastern District of Louisiana to challenge the application of the "transfer rule" to their children which in effect penalized every child in the New Orleans area who legitimately seeks to obtain a Lutheran parochial education by making them ineligible to participate in intersholastic athletics for one year following their matriculation from eighth to ninth grade. The District Court rejected plaintiffs' challenges to the application of the rule based upon claims of undue burden on free exercise of religion and denial of due process, but agreed that the application of the rule denied petitioners and their children equal protection under the law since provisions were made to accomodate children attending schools to obtain secular educational programs not available at other schools, but no such provisions were made with regard to children seeking religious education. The Court of Appeals disagreed with the Trial Court, rejecting all of petitioners' arguments, and reversed. A petition for rehearing and rehearing *en banc* was thereafter denied. Jurisdiction in the Trial Court was based upon 28 U. S. C. 1343(3), and although jurisdiction was challenged both in the District Court and the Court of Appeals, these challenges were rejected in both Courts.

REASONS FOR GRANTING WRIT

Petitioners submit that in this case the Court of Appeals decided federal questions of great import not heretofore specifically determined by this Court, or in the alternative, that it decided those questions in a way which is not in accord with applicable decisions of this Court.

The basic questions raised by the case do not appear to have ever come before this Court. Prior cases before the Court which come closest to dealing with the free exercise of religion issue seems to be *Wisconsin vs. Yoder*, 406 U.S. 205, 92 S. Ct.

1526, 32 L. Ed. 2d 15 (1972), recognizing the constitutional rights of parents to direct the course of their children's education on religious grounds, and ***Sherbert vs. Verner*** 347 U.S. 398, 83 S. Ct. 1790, 10 L Ed. 2d 965 (1963), balancing the interest between legitimate free exercise of religious beliefs against administrative regulatory schemes of the State in the area of unemployment benifits. Also relevant is the decision in ***United States vs. Robel***, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967), a First Amendemnt case not dealing with the Free Exercise Clause, which, however, stands for the proposition that where First Amendment rights are at stake, Congress should achieve its goals by means which have a less drastic effect on protected freedom where feasible.

The record in this case clearly establishes that all of plaintiffs' children had long been pursuing an education within the Lutheran School system and that their election to matriculate to the only available Lutheran High School was religiously motivated. Defendants freely admitted that there was no evidence whatsoever to indicate that any of plaintiffs' children attended Lutheran High School as a result of having been recruited for athletic purposes, nor that Lutheran High School had ever recruited any children for athletic purposes. Yet despite this the entire freshman class at Lutheran High every year is deemed ineligible to compete in interscholastic sports for being in violation of the Louisiana High School Athletic Association's "transfer rule" the sole purpose of which is to prevent athletic recruiting.

Evidence introduced at the trial through an expert in the psychology and sociology of sports indicated that denying children the opportunity to compete in interscholastic sports for one year had the potential to reduce their peer group esteem, lower their academic grades and diminish their self-reliance. And, for the child possessed of above average athletic skills, it deprives him of the opportunity to develop and hone skills in a competitive context. Furthermore, in the present

case, the absence of freshmen from the teams in some sports made it impossible to field a team and thus all of the other eligible children in the school were indirectly being punished too.

Petitioners submit that the impact on the plaintiffs' children is not *de minimus*, and the fact that they are suffering the sanctions described soley as a result of their decision to continue their religious education should make this a case of significant import to warrant the granting of writs. 1/

With regard to the issue of due process, the Court of Appeals relied on its own prior decision in *Mitchell vs. Louisiana High School Athletic Association*, 430 F. 2d 115 (5th Cir. 1970) which held that the "privilege" of participating in interscholastic athletics was not a right protected by the due process clause. Petitioners however argue that the wooden distinction between right and privilege has been expressly abandoned by this Court in *Graham vs. Richardson*, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) and *Goldberg vs. Kelly*, 397 U. S. 254, 24 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Furthermore this Court has specifically held a child's entitlement to an education to be a property interest protected by the due process clause which cannot be taken away without adherence to minimum procedural standards required by that clause. Petitioners submit that the same principle should apply to a component part of the educational process, namely athletic sports competition. *Accord, Brendon vs. Independent School District*, 477 F. 2d 82 (8th Cir. 1973).

1/ Petitioners also point out that this is not an isolated case as evidenced by the Louisiana Supreme Court case of *Chabert vs. Louisiana High School Athletic Association*, 323 So. 2d 774 (1975) involving Catholic children matriculating to the only Catholic high school in the area from the Catholic elementary schools.

The affront to the due process clause in the present case lies in the creation of a virtually irrebutable presemption by the transfer rule that all children who matriculate to a school outside of an artificially created attendance zone do so because they were recruited for athletic purposes. The Athletic Association permits limited opportunities under the rule to rebut the presumption to show that a "transfer" was precipitated by a bona fide parental move or resulted from separation or divorce, but no opportunity is given to a child to show that he or she matriculated for purely religious reasons. Petitioners submit that the interplay of free exercise of religion and due process should require than opportunity to rebut the presumption.

Lastly with regard to the issue of equal protection, the Trial Court struck down the challenged rule on the basis of denial of equal protection in reliance upon this Court's holding in *Williamson vs. Lee Optical of Oklahoma*, 343 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). The Court of Appeals, citing the same case, held the rule (and its exemptions) did not violate equal protection. The critical facts are that the transfer rule mandates generally that students must attend the high school within their designated attendance zone, which is established based upon the location of public high schools. A second class of schools however is created within Orleans Parish for four "special program" schools, which are permitted to have open parish wide attendance zones. The rationale behind the creation of a separate class of schools with parish wide attendance zones is that they offer programs not available at any other public schools. Petitioners contend, and the Trial Court agreed, that Lutheran High School also should be treated as a school offering a special program not elsewhere available, namely a Lutheran Education. As the Trial Judge stated in his opinion:

". . . the division into classes must bear at least some rational relationship to the end sought to be achieved. (citation omitted). The distinction between Lutheran High on the one hand and the four public schools on the other appears to be based on no consideration that has any logical relationship to athletic recruiting." (428 F. Supp. 1261 at p. 1271)

CONCLUSION

As stated above, this case deals with one of the most fundamental rights in our society, the right of parents to rear their children as they see fit and to provide for them the benifits of a religious education combined with a solid secular education, which includes, in some instances, the opportunity to participate in interscholastic sports. Where, as here, the Louisiana High School Athletic Association without any articulable or judtificable excuse, penalizes entire classes at a parochial school, and in fact offers the parents and children an inducement to forgo their religious education to gain the opportunity to compete in interscholastic sports competition, the Court should take the opportunity to clarify the supremacy of the First Amendment and Fourteenth Amendment guarantees and protections and grant these writs.

RESPECTFULLY SUBMITTED:

Edmund T. Wegener, Jr. [illegible]

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition have been duly served upon the adverse parties herein by depositing the same in the United States mail, with first class postage prepaid, addressed to the counsel of record for the adverse parties at his post office address.

New Orleans, Louisiana, this 6th day of October, 1980.

Edmund T. Wegener, Jr.

Edmund T. Wegener, Jr.

APPENDIX A

Catherine WALSH, etc., et al.,
Plaintiffs-Appellees,

v.

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

Lutheran High School Association of Greater New Orleans,
Defendant.

NO. 77-1792

United States Court of Appeals,
Fifth Circuit.

April 30, 1980.

Parents individually and on behalf of their named minor children brought action against the Louisiana State High School Athletic Association and the Lutheran High School Association of Greater New Orleans, to challenge a student transfer rule. The United States District Court for the Eastern District of Louisiana, at New Orleans, Alvin B. Rubin, J., 428 F. Supp. 1261, held that the transfer rule, as applied, unconstitutionally denied equal protection. On appeal by the athletic association, the Court of Appeals, Charles Clark, Circuit Judge, held that: (1) court had jurisdiction; (2) the case was not moot; (3) there was no unconstitutional burden on free exercise of religion nor denial of due process; and (4) the transfer rule was not violative of equal protection either by reason of creating two classes of students or by reason of creating two classes of schools, there being rational and logical reasons for such classifications.

Reversed.

1. **Schools key 118**

Action to challenge existence and enforcement of student transfer rule was properly brought against both Louisiana State High School Athletic Association, which promulgated transfer rule, and Lutheran High School Association of Greater New Orleans, which, as member of such athletic association, enforced the regulation.

2. **Civil Rights key 13.7**

Louisiana State High School Athletic Association, being voluntary association of private, parochial and public high schools, and being not regularly constituted agency of state, nor its existence provided for by Constitution, statutes or regulations of state, was "person" within meaning of 1871 civil rights statute, application of such statute being not precluded by fact that conduct of association constituted state action for purposes of Fourteenth Amendment; as to such defendant, there was "civil action authorized by law" within meaning of civil rights jurisdictional statute. 42 U. S. C. A. § 1983; 28 U. C. C. A. §§ 1343, 1343(3); U. S. C. A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Federal Courts key 244**

Suits for which original jurisdiction is provided by federal civil rights jurisdictional statute must be entertained by district court unless federal question alleged is clearly immaterial and made solely for purpose of obtaining jurisdiction or is wholly unsubstantial and frivolous. 28 U. S. C. A. §§ 1343, 1343(3).

4. **Federal Courts key 244**

Federal question, for purposes of federal civil rights jurisdictional statute, was not "immaterial" where constitutional claims, whatever their merit or substance, were essence of action. 28 U. S. C. A. § 1343(3).

5. **Federal Courts key 244**

To determine whether federal question assertedly presented by civil rights action was "wholly insubstantial and frivolous" for purposes of federal jurisdiction, it was necessary to inquire whether constitutional claims were obviously without merit or were clearly foreclosed by previous decisions of United States Supreme Court. 28 U. S. C. A. § 1343(3).

See publication Words and Phrases for other judicial constructions and definitions.

6. **Federal Courts key 243**

Allegation, in addition to allegations raising due process and equal protection claims, that student transfer rule of Louisiana State High School Athletic Association was undue burden upon First Amendment right of students to free exercise of religion was not "obviously without merit," nor was First Amendment claim clearly foreclosed by previous decisions of United States Supreme Court, and thus federal district court had subject-matter jurisdiction of action. 28 U. S. C. A. § 1343(3); U. S. C. A. Const. Amends. 1, 14.

See publication Words and Phrases for other judicial constructions and definitions.

7. **Federal Courts key 13**

As against contention that action brought by students to

challenge student transfer rule was moot because minor plaintiffs originally named in complaint had completed ninth grade and were no longer subject to one-year period of athletic ineligibility was without merit in view of exception for conduct "capable of repetition, yet evading review."

8. **Federal Courts key 12**

The "capable of repetition, yet evading review" exception to rule of mootness requires that challenged action be in its duration too short to be fully litigated prior to its cessation or expiration, and requires reasonable expectation that same complaining party would be subjected to same action again.

9. **Constitutional Law key 84**

Regulation that is neutral on its face and is motivated by legitimate secular concerns may in its application offend First Amendment requirement of government neutrality if it unduly burdens free exercise of religion, and, to pass constitutional muster, application must either not interfere with, burden or deny free exercise of legitimate religious belief or must be justified by state interest of sufficient magnitude to override interest claiming protection under the free exercise clause. 42 U. S. C. A. § 1983; U. S. C. A. Const. Amend. 1

10. **Constitutional Law key 84**

In view of de minimis burden placed on free exercise of religion by student transfer rule, which simply prevented child from representing Lutheran high school in interscholastic athletic contest for period of one year and in view of constitutional justification by magnitude of state's compelling interest in regulation and lack of equally effective and workable alternative, there was no unconstitutional burden on right to exercise of religion. U. S. C. A. Const. Amend. 1; 42 U. S. C. A. § 1983.

11. Constitutional Law key 211(4)

Constitutional challenge to denial of benefit cannot be answered merely by arguing that benefit is privilege rather than right, but there remain some interests that are outside scope of constitutional protection. U. S. C. A. Const. Amend. 1, 14.

12. Constitutional Law key 252.5

Due process clause of Fourteenth Amendment extends protection to those fundamental aspects of life, liberty and property that rise to level of legitimate claim of entitlement but does not protect lesser interests or mere expectations, and student's interest in participating in single year of interscholastic athletics amounts to mere expectation rather than constitutionally protected claim of entitlement and falls outside due process protection. U. S. C. A. Const. Amend. 14.

13. Constitutional Law key 213.1(2)

Where classification created by regulatory scheme neither trammels fundamental rights or interests nor burdens inherently suspect class, equal protection analysis requires that classification be rationally related to legitimate state interest. U.S.C. A. Const. Amend. 14.

14. Constitutional Law key 242.2(5)

In view of fact that student transfer rule sought to deter or eliminate inducement of students to change school in order to enhance quality of teams at recruiting school, classification by rule, insofar as creating two classes of students, and classification insofar as creating two classes of schools, were both rationally and logically related to valid and legitimate interest of Louisiana State High School Athletic Association. and thus there was no denial of equal protection. U. S. C. A. Const. Amend. 14.

15. Constitutional Law key 211(1)

Equal protection clause does not require state to grant all constitutionally permissible exemptions from general statutory scheme merely because it has chosen to grant one such exception. U. S. C. A. Const. Amend. 14.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHARLES CLARK RONEY and HENDERSON, Circuit Judges.

CHARLES CLARK, Circuit Judge:

[1] Catherine Walsh, Charles Lodriguss, William LeBouef, Jr., and Elmer A. Groth, Jr., individually and on behalf of their named minor children, brought this action against the Louisiana High School Athletic Association [LHSAA] and the Lutheran High School Association of Greater New Orleans 1/ The plaintiffs alleged in their complaint that the existence

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1/ The plaintiffs properly brought this action against both the LHSAA, who promulgated the transfer rule, and the Lutheran High School Association of greater New Orleans, who, as a member of the LHSAA, enforced the regulation. The dispute, however, exists primarily between the plaintiffs and the LHSAA. In a separate answer to the plaintiffs' complaint, the Lutheran High School Association admitted all of the plaintiffs' allegations and submitted the matter to the district court for such relief and disposition as the court deemed proper. Although nominally an appellant before this court, the Lutheran High School Association took no active part in this appeal.

and enforcement of the LHSAA's student transfer rule unduly burdened their first amendment right to the free exercise of religion and deprived them of their fourteenth amendment right of equal protection. The district court's April 1, 1976, pre-trial order referred to an additional claim based on a denial of the plaintiffs' fourteenth amendment right to due process. In an opinion dated September 21, 1976, the district court denied the defendants' motion to dismiss for mootness. Subsequently, in an opinion dated March 18, 1977, the district court determined that it had subject matter jurisdiction of this action under 28 U. S. C. § 1343(3), that the transfer rule did not unconstitutionally burden the plaintiffs' first amendment right to the free exercise of religion, that the transfer rule did not unconstitutionally offend due process, but that the transfer rule as applied in Orleans Parish, Louisiana, unconstitutionally denied the plaintiffs the equal protection of the laws. ***Walsh v. Louisiana High School Athletic Assn'n,*** 428 F. Supp. 1261 (E. D. La. 1977). The defendants appealed. We agree with the district court's determination of the issues of jurisdiction, mootness, free exercise of religion, and due process, but disagree with district court's determination that the transfer rule as applied in Orleans Parish, Louisiana, is unconstitutional under the equal protection clause of the fourteenth amendment.

1. FACTS

The LHSAA is a voluntary association of public, private, and parochial high schools in the State of Louisiana. The purpose of the LHSAA is to promote, regulate, and direct the interscholastic athletic activities of its member schools. In fulfilling its purpose, it promulgates and enforces various rules and regulations governing the competitive athletic activities of its members. The LHSAA promulgated one such rule in an effort to discourage or eliminate the recruitment of promising young athletes upon graduation from elementary or junior high schools. This rule provides in relevant part that,

upon the completion of elementary or junior high school, a student is eligible to participate immediately in interscholastic athletic competition only at a high school within his home district 2/ These home districts are the geographical areas designated as the attendance zones for the public high schools by the local school boards of the State of Louisiana. The home district for a private or parochial school is the geographical attendance zone of the public school in which the private or parochial school is situated. Under the transfer rule, a student is ineligible to participate in interscholastic athletic competition for a period of one year if he matriculates at a high school outside of his home district after completing elementary or junior high school.

Lutheran High School is the only high school in the greater New Orleans metropolitan area that is owned and operated by members of the Lutheran Church Missouri Synod. There are seven Lutheran-affiliated elementary or junior high schools in the greater New Orleans area. However, none of these elementary or junior high schools are located in Lutheran High

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2/ The transfer rule appears at art. I, § 8 of the by-laws of the LHSAA. That section, in relevant part, provides that:

Section 8. Transfer Rule

Rule 1 - No student who enrolls in one school and later transfers to, or enrolls in another, shall be eligible to represent the latter school in any athletic contest.

A student shall be considered as enrolled in a high school when he has enrolled and attended any class in that school. Attendance in any class constitutes enrollment.

EXCEPTION I-. . .

A student may transfer upon the completion of the seventh or eighth grade to any high school in his home district and be eligible immediately.

EXCEPTION II- Any student after completing one year's attendance from date of enrollment, in a high school, and fulfilling all other requirements, becomes eligible.

School's designated home district. As a result, any student who enrolls at Lutheran High School upon graduation from any of the seven Lutheran elementary or junior high schools in the metropolitan New Orleans area is ineligible to compete in interscholastic athletic competition for one year. Each of the minor plaintiffs orginally named in the complaint graduated from Lutheran elementary schools, enrolled at Lutheran High School, and were declared ineligible for interscholastic athletic competition during their ninth grade year.

II. JURISDICTION

[2] The LHSAA contends that the district court erred in determining that it had jurisdiction of this action under 28 U. S. C. § 1343(3). It argues first that, as to it, this is not a "civil action authorized by law" within the meaning of § 1343 because it is not a "person" within the meaning of 42 U. S. C. § 1983. It contends second that § 1343(3) jurisdiction is lacking because the action fails to raise a substantial federal question. We reject these arguments.

The LHSAA argues that, because it is not a "person" within the meaning of § 1983, this is not a "civil action authorized by law" and hence the district court is without § 1343(3)

2/ Continued

Rule 2- . . .
School districts or attendance areas, designated by the Public School Boards, determine eligibility under the transfer rule. School bus routes do not establish eligibility.

Private schools shall be bound by the same school district or attendance areas designed by the school board for the public school physically located in their area.

jurisdiction as to it.[3] *See, e. g., Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1377 (M. D. Fla. 1978). It reasons that it is a local governing body similar to municipalities and other political subdivisions of a state and. hence. is not a "person" for the purposes of § 1983. It relies on *Monroe v. Pape*, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), and its progeny, *Kenosha v. Bruno*, 412 U. S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973); *Moor v. County of Alameda*, 411 U. S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973). Whatever merit there may have been in the association's argument has vanished in light of the Supreme Court's recent decision in *Monell v. Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). *See Gay Student Services v. Texas A & M University*, 612 F. 2d 160, 164 (5th Cir. 1980); *Kingsville Independent School District v. Cooper*, 611 F. 2d 1109, 1112 (5th Cir. 1980).

The LHSAA is a voluntary association of private, parochial and public high schools. It is not a regularly constituted agency of the State of Louisiana. Neither is its existence provided for by the constitution, statutes, or regulations of the State of Louisiana. The fact that its conduct constitutes state action for the purposes of the fourteenth amendment, *See Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F. 2d 224, 227 (5th Cir. 1968), does not dictate that it is not a "person" for the purposes of the Civil Rights Acts. We therefore conclude that the LHSAA is a person for the purposes of § 1983, *See Wright v. Arkansas Activities Ass'n* 501 F. 2d 25, 28 (8th Cir. 1974), and that as to the LHSAA there exists a "civil action authorized by law" within the meaning of § 1343(3).

3/ No party disputes that the Lutheran High School Association of Greater New Orleans is a "person" for the purposes of § 1983.

[3-5] The defendants next contend that § 1343(3) jurisdiction is lacking because this action fails to raise a substantial federal question. Under § 1343(3) federal district courts have original jurisdiction over "civil action[s] authorized by law" that seek "[t]o redress the deprivation, under color of State law, . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights." 28 U. S. C. § 1343(3). A district court must entertain such suits unless the federal question alleged is clearly immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous. *See generally Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274, 279, 97 S. Ct. 568, 572, 50 L. Ed. 2d 471, 478 (1977); *Bell v. Hood*, 327 U. S. 678, 681-83, 66 S. Ct. 773, 776, 90 L. Ed. 939, 942-44 (1946); *Southpark Square, Ltd. v. City of Jackson*, 565 F. 2d 338, 341 (5th Cir. 1977), *cert. denied*, 436 U. S. 946, 98 S. Ct. 2849, 56 L. Ed. 2d 787 (1978). The first exception-that the federal question be "immaterial" - is not involved in this case because the constitutional claims, whatever their merit or substance, are the essence of the action. *See Crell v. City of Atlanta, 399 F. 2d 777*, 778 (5th Cir. 1968). To determine whether the second exception - that the federal question be "wholly insubstantial and frivolous" - applies we must inquire whether the constitutional claims are obviously without merit or are clearly foreclosed by the previous decisions of the United States Supreme Court. *See Southpark Square, Ltd. v. City of Jackson*, 565 F. 2d at 342; *Mays v. Kirk*, 414 F. 2d 131, 135 (5th Cir. 1969).

This court previously has held that an action alleging a violation of due process arising solely from an interference with a student's ability to participate in interscholastic athletic competition fails to raise a substantial federal question so as to clothe a federal district court with jurisdiction under § 1343(3). *Mitchell v. Louisiana High School Athletic Ass'n*,

430 F. 2d 1155, 1157-58 (5th Cir. 1970). Similarly, prior case authority in this circuit suggests that an action alleging a violation of equal protection arising from an interference with a student's ability to participate in interscholastic athletic competition fails to raise a substantial federal question unless it is alleged that the challenged classification burdens a suspect class. *Compare id.* at 1157-59 *with Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F. 2d at 227-29. But *see Denis J. O'Connell High School v. Virginia High School League*, 581 F. 2d 81 (4th Cir. 1978), *cert. denied*, 440 U. S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979).

[6] In this action, however, in addition to raising due process and equal protection claims, the plaintiffs alleged that the transfer rule unduly burdened their first amendment right to the free exercise of religion. It cannot be said that the first amendment claim asserted in the plaintiffs' complaint is "obviously without merit." *See Johnson v. Spriggs*, 77 F. R.D. 492, 493-94 (W. D. La. 1978). Neither can it be said that the first amendment claim advanced in the plaintiffs' complaint is clearly foreclosed by previous decisions of the United States Supreme Court.

Accordingly, the district court properly determined that it had subject matter jurisdiction of this action under § 1343(3).

III. MOOTNESS

[7, 8] The LHSAA raised the issue of mootness before the district court and again on appeal, contending that this case is moot because all of the minor plaintiffs originally named in the complaint have completed the ninth grade at Lutheran High School and no longer are subject to the one-year period of athletic ineligibility. The district court determined that the action is not moot because it fell within the "capable of repetition, yet evading review" exception established in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*,

219 U. S. 498, 514-16, 31 S. Ct. 279, 283-84, 55 L.Ed. 310, 315-17 (1911). We agree.

The "capable of repetition, yet evading review" exception requires that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again". *Weinstein v. Bradford*, 423 U. S. 147, 149, 96 S. Ct. 347, 349, 46 L. Ed. 2d 350, 352 (1975). *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U. S. 173, 187, 99 S. Ct. 983, 992, 59 L. Ed. 2d 230, 243 (1979); *Securities & Exchange Commission v. Sloan*, 436 U. S. 103, 109, 98 S. Ct. 1702, 1707, 56 L. Ed. 2d 148, 155 (1978); *First Nat'l Bank of Boston v. Bellotti*, 435 U. S. 765, 774, 98 S. Ct. 1407, 1414, 55 L. Ed. 2d 707, 716 (1978). *See generally Sosna v. Iowa*, 419 U. S. 393, 399 - 401, 95 S. Ct. 553, 557-58, 42 L. Ed. 2d 532, 540 - 41 (1975). Both prongs of the test are met in this case. First, the experience of modern litigation demonstrates that the constitutional challenges to the transfer rule cannot be litigated fully during the one-year period of athletic ineligibility suffered by an individual student. Second, because the plaintiff parents had other minor children who currently were enrolled at various Lutheran elementary or junior high schools and who ultimately would matriculate at Lutheran High School, the district court reasonably could expect that the same complaining parties again would be subject to the challenged action in the future. Indeed, at oral argument counsel confirmed the widson of the district court's determination by advising this court that one of the plaintiffs' other minor children who ultimately matriculated at Lutheran High School from one of the Lutheran elementary schools currently was enrolled in the ninth grade and was subject to the effects of the transfer rule. 4/

4/ The LHSAA currently is not enforcing the transfer rule against students

IV. FREE EXERCISE OF RELIGION

The plaintiffs argue that the transfer rule unconstitutionally burdens their free exercise of religion guaranteed by the first amendment. These parents indicate a sincere belief that Christian education is an integral part of the mission and ministry of the Lutheran church and that the family, rather than the state, is responsible for a child's education. Furthermore, they indicate that they responded to the dictates and compulsion of their religious beliefs by enrolling their children in Lutheran-affiliated schools. The district court detemined that the operation of the transfer rule did not violate the first amendment. We agree.

[9] A regulation that is neutral in its face and is motivated by legitimate secular concerns may, in its application, offend the first amendment requirement of governmental neutrality if it unduly burdens the free exercise of religion. *Wisconsin v. Yoder*, 406 U. S. 205, 220, 92 S. Ct. 1526, 1536, 32 L. Ed. 2d 15, 27 (1972). *See also Gillette v. United States*, 401 U. S. 437, 462, 91 S. Ct. 828, 842, 28 L. Ed. 2d 168, 187 (1971); *Braunfeld v. Brown*, 366 U. S. 599, 607, 81 S. Ct. 1144, 1148, 6 L. Ed. 2d 563, 568 (1961). To pass constitutional muster, the application of such a regulation either (1) must not interfere with, burden, or deny the free exercise of a ligitimate religious belief or (2) must be justified by a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. *Wisconsin v. Yoder*, 406 U.S. at 214, 92 S. Ct. at 1532, 32 L. Ed. 2d at 24; *Sherbert v. Verner, 374 U. S. 398, 403, 83 S. Ct. 1790*, 1793, 10 L. Ed. 2d 965, 970 (1973). *See also Braunfeld v. Brown*, 366 U. S. at 607, 81 S. Ct. at 1148, 6 L. Ed. 2d at 568.

4/Continued

at Lutheran High School but has announced its intention to enforce the regulation should it prevail on this appeal.

[10] It cannot be denied that, by imposing a cost on a parent's decision to enroll his children in Lutheran High School upon graduation from any of the seven Luthern elementary schools in the metropolitan New Orleans area, the transfer rule places an indirect and incidental burden on the free exercise of the religious beliefs of these parents. The decisive issue is whether this indirect and incidental burden is an impermissible price to exact from these parents for the free exercise of their religious beliefs. We believe it is not.

The encroachment of the transfer rule on the free exercise of religion is both limited in scope and insignificant in magnitude. The transfer rule does not deny these parents or their children the right to actively practice the Lutheran faith. Similarly, it neither prohibits a parent from enrolling his child in Lutheran High School nor interferes with the ability of such a child to obtain the religious education provided by that school. The rule merely prevents a child from participating in interscholastic athletic competition during his ninth grade year. Even so, the ambit of the rule is limited. It does not forbid a student from participating in all athletic activities. The transfer rule does not prevent ninth graders at Lutheran High School from participating in intramural athletic competition. Neither does the rule prohibit such students from trying out for or from practicing with the Lutheran High School varisity athletic teams. It simply prevents a child from representing Lutheran High School in an interscholastic athletic contest for a period of one year. The burden placed on the free exercise of religion is *de minimus*.

The relatively minor and inconsequential nature of this burden is confirmed by reference to other restrictions placed on the free exercise of religion which, although far greater than that existing here, have been found constitutionally permissible. *See e. g., Johnson v. Robinson*, 415 U. S. 361, 94 S. Ct. 1160, 39 L. Ed 2d 389 (1974) (right of a conscientious objector to receive veterans' educational benefits); *Braunfeld v. Brown*,

366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 right of an Orthodox Jew to keep his business open on Sunday); *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (right of a Jehovah's Witness to sell or distribute periodicals and literature).

Although the *de minumus* nature of the burden placed on the plaintiffs' free exercise of religion is sufficient to reject plaintiffs' first amendment challenge to the LHSAA transfer rule, *see* J. Nowak, R. Rotunda, J. Young, *Handbook on Constitutional Law* 872 (1978), we further find the application of the transfer rule, together with its incidental burden on the free exercise of religion, is constitutionally justified by the magnitude of the state's interest in the regulation and the lack of an equally effective and workable alternative.

The state's interest in the regulation is compelling. Its interest in regulating interscholastic athletic competition is not disputed by the parties to this litigation. Indeed, all parties recognize that the recruiting of promising young athletes properly may be the focus of LHSAA regulations because of the unwholesome and harmful impact such recruiting has both on interscholastic athletic competition and on the individual student athletes. The LHSAA promulgated the transfer rule to lessen or remove that harmful impact. 5/

The state's compelling interest in this particular regulation is magnified in light of the district court's determination that no equally effective alternative means exist to combat the problem of recruiting. The plaintiffs introduced evidence showing the

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5/ The plaintiffs do not dispute the LHSAA's valid interest in deterring or eliminating the recruiting of promising young athletes. Rather, they argue that the burden imposed on the free exercise of religion is unduly heavy and that there exists alternate means to attack the evils of recruiting which would impose little or no burden on the free exercise of religion.

methods utilized by regulating bodies in other states to combat the recruiting of athletes. The district court, however, specifically rejected those alternate plans that included case by-case inquiries into suspected recruiting violations or an after-the-fact punishment of those involved in such violations. It reasoned that, as a pragmatic matter, the only feasible solution to the problem of recruiting was the adoption and enforcement of a clear, readily understandable prophylaxis that limits the alternatives available to students. The district court concluded that "[i]f there is an alternative [to the transfer rule] that is workable, its feasibility has not been shown." 428 F. Supp. at 1269. A review of the evidence presented to the district court shows this finding of fact not to be clearly erroneous. Fed. R. Civ. P. 52(a).

V. DUE PROCESS

The plaintiffs contend that the transfer rule violates their fourteenth amendment right of due process. They note that a student's legitimate entitlement to an education is a property interest protected by the due process clause of the fourteenth amendment. *Goss v. Lopez*, 419 U. S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725, 734 (1975). They contend that this property interest extends to all integral parts of the deucational process and includes a constitutionally protected entitlement to participate in interscholastic athletic competition. We disagree.

This court previously has addressed this precise issue. *See Mitchell v. Louisiana High School Athletic Association*, 430 F. 2d 1155 (5th Cir. 1970). In *Mitchell*, this court held that "[t]he privilege of participating in interscholastic athletics must be deemed to fall. . . outside the protection of due process." *Id.* at 1158. The holding and rationale of *Mitchell* has been followed consistently in this and other circuits. *See Parish v. National Collegiate Athletic Ass'n* 506 F. 2d 1028

(5th Cir. 1975). *See also Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F. 2d 121, 123-24 (3d Cir. 1978); *Hamilton v. Tennessee Secondary School Athletic Assn'n*, 552 F. 2d 681, 682 (6th Cir. 1976); *Albach v. Odle*, 531 F. 2d 983-85 (10th Cir. 1976).

[11] The plaintiffs argue that *Mitchell* no longer is viable authority. They rely on those Supreme Court cases in which the historical distinction between rights and privileges was abandoned. The plaintiffs correctly note that a constitutional challenge to the denial of a benefit cannot be answered merely by arguing that the benefit is a privilege rather than a right. *See, e.g., Goldberg v. Kelly*, 397 U. S. 254, 262, 90 S. Ct. 1011, 1017, 25 L. Ed. 2d 287, 296 (1970); *Shapiro v. Thompson*, 394 U. S. 618, 627 n.6, 89 S. Ct. 1322 n.6, 22 L. Ed. 2d 600, 611 n.6 (1969); *Sherbert v. Verner*, 374 U. S. at 404-06, 83 S. Ct. at 1794-95, 10 L. Ed. 2d at 970-72. However, the plaintiffs fail to note that, despite the abandonment of the right-privilege distinction, there remain some interests that are outside the scope of constitutional protection.

[12] The due process clause of the fourteenth amendment extends constitutional protection to those fundamental aspects of life, liberty, and property that rise to the level of a "legitimate claim of entitlement" but does not protect lesser interests or "mere expectations." *See Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 9, 98 S. Ct. 1554, 1560, 56 L. Ed. 2d 30, 39 (1978); *Perry v. Sindermann*, 408 U. S. 593, 602, 92 S. Ct. 2694, 2700, 33 L. Ed. 2d 570, 580 (1972); *Board of Regents v. Roth*, 408 U. S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972). A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement. As decided in *Mitchell*, it falls "outside the protection of due process." The district court properly denied the plaintiffs relief based on their due process claim.

VI. EQUAL PROTECTION

The district court determined that the transfer rule as applied in Orleans Parish, Louisiana, violated the fourteenth amendment guarantee of equal protection. We disagree.

The plaintiffs rise two distinct equal protection issues. First, they contend that the transfer rule creates two classes of students: those who enroll in a high school within their home district upon the completion of elementary or junior high school and those who enroll in a high school outside their home district. They further contend that the rule treats these two classes of students differently by permitting members of the former group to compete immediately in interscholastic athletic competition while declaring the members of the latter group ineligible for such competition for a period of one year.

Second, the plaintiffs claim that the transfer rule as it is applied in Orleans Parish creates two classes of schools: those schools that have parishwide home districts 6/ and those schools that have home districts that are less than parishwide. They claim that the transfer rule treats students who attend these two classes of schools differently, observing that students from throughout Orleans Parish, if qualified, may enroll at any of the schools in the former group and be immediately eligible for interscholastic athletic competition, while district non-resident students, though they live in Orleans Parish, may not enroll at schools in the latter group without being declared ineligible to compete in interscholastic

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6/ The Orleans Parish School Board designated the entire Orleans Parish as the attendance zone for four special public high schools: Ben Franklin, McDonough 35, McMain Magnet, and Booker T. Washington. Each school either offers a special curriculum or has special entrance requirements.

athletic contests for a period of one year.

[13] Where, as here, the classification created by the regulatory scheme neither trammels fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest. *See e. g., Parham v. Hughes,* 441 U. S. 347, 350-53, 99 S. Ct. 1742, 1745-46, 60 L. Ed. 2d 269, 273-76 (1979); *City of New Orleans v. Dukes,* 427 U. S. 297, 303, 96 S. Ct. 2513, 2516-17, 49 L. Ed. 2d 511, 516 (1976); *Jackson v. Marine Exploration Co.,* 583 F. 2d 1336, 1346 (5th Cir. 1978). Both classifications meet this standard.

[14] The Classification of students created by the transfer rule is rationally related to the state's valid and legitimate interest in deterring or eliminating the recruitment of promising young athletes by overzealous coaches, fans, and faculty members. The district court recognized that prior to the promulgation of the transfer rule

> [h]igh schools, public and private, eager to enlist promising athletes, were urging students who would otherwise attend another school to change the school they would attend in order to enhance the quality of the teams at the recruiting school. Some alumni association, athletic clubs, and even principals and coaches resorted to various expedients unrelated to educational goals to recruit promising student athletes. Therefore, promising young athletes were being subjected to inducements to go to one school or another purely to enable the school to field a better team.

428 F. Supp. at 1264. The rule seeks to deter or eliminate such recruitment conduct. Accordingly, it imposes a direct cost on an identifiable event that must necessarily accompany that conduct. Moreover, by exacting its price in terms of a period

of interscholastic athletic ineligibility, the transfer rule focuses its effect on athletic recruiting. The rule adopted by the LH SAA, together with the classification that results, is rationally and logically related to the association's valid and legitimate interest.

Similarly, the classification of all schools resulting from the LHSAA's decision to define home districts in terms of local public school attendance zones passes constitutional muster. It is undisputed that, by choosing to adopt a parishwide attendance zone for four public schools, the Orleans Parish School Board created a classification among public schools that is rationally and logically related to a valid state interest: making the special educational programs offered at these four schools available to all students living in Orleans Parish. However, the plaintiffs argue that the effect of designating a parishwide attendance zone as the home district of these four special public schools is to partially exempt these schools from the transfer rule. Acknowledging that is so does not acknowledge a violation of equal protection because the exemption, like the overall regulatory classification created by the transfer rule, is logically and rationally related to the association's valid interest in deterring or eliminating athletic recruitment. The evidence adduced at trial demonstrates the logical and rational relationship behind such an exemption, showing first that recruiting had not been a problem at these four special public schools and indicating second that these schools likely would not experience a problem with recruiting in the future because of the special nature of the educational programs offered at these schools.

[15] The plaintiffs argue that, because the evidence also suggested that recruiting had not been a problem at Lutheran High School in the past and was not likely to be a problem in the future, the LHSAA violated the equal protection clause of the fourteenth amendment by failing to exempt it from the transfer rule. There is no merit to this argument. The equal

protection clause does not require a state to grant all the constitutionally permissible exemptions from a general statutory scheme merely because it has chosen to grant one such exception. ***See generally, City of New Orleans v. Dukes,*** 427 U. S. at 304-05, 96 S. Ct. at 2517-18, 49 L. Ed. 2d at 517-18 (1976); ***Williamson v. Lee Optical,*** 348 U. S. 483, 488-91, 75 S. Ct. 461, 465-66, 99 L. Ed. 563, 572-74 (1955).

Accordingly, the district court erred in determining that the LHSAA's transfer rule, as applied in Orleans Parish, Louisiana, violated the equal protection clause of the fourteenth amendment.

The judgment appealed from is

REVERSED.

APPENDIX B

Catherine WALSH et al., Plaintiffs
v.
LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION et al.,
Defendants.

Civ. A. No. 75-2458.

United States District Court,
E. D. Louisiana.
March 17, 1977.

Parents of children who attended Lutheran parochial elementary schools and who wished to attend the only Lutheran high school available to them, a school not in their home district brought suit challenging the constitutionality of state high school athletic association's "transfer rule," which restricts the eligibility of a child to compete in interscholastic high school athletic contests if the child, upon completion of the seventh or eight grade, enrolls in any high school other than the one in the child's home district. The District Court, Alvin B. Rubin, J., held that the transfer rule withstood constitutional attacks made on the basis that it encroaches on religious freedom and denies due process, but the rule was unconstitutional in exempting four public schools with citywide attendance and thereby denying plaintiffs equal protection of the law.

Order in accordance with opinion.

1. Constitutional Law key 274(2)
Privilege of participating in athletic competition per se is not protected by the due process clause. U. S. C. A. Const. Amend. 14.

2. Constitutional Law key 84

First Amendment protects the right to attend religious schools instead of public institutions, not only as a form of religious exercise but also because the Constitution implies a guarantee of liberty to parents and guardians that permits them to direct the education and rearing of children under their control U. S. C. A. Const. Amend. 1

3. Constitutional Law key 84

In the area of the First Amendment right to free exercise of religion, balanced scales weigh against government regulation; the state must have a compelling interest in the regulation, and there must be no equally effective alternative means to achieve the state's objective, U. S. C. A. Const. Amend. 1;

4. Constitutional Law key 82

A statute or state regulation may be invalid because it inhibits First Amendment rights even when it does not preclude them, because of what has been appropriately called its "chilling effect" on the exercise of those rights. U. S. C. A. Const. Amend. 1.

5. Constitutional Law key 84

Schools and School Districts key 172

State high school athletic association's "transfer rule," which restricts the eligibility of a child to compete in interscholastic athletic contests if the child, upon completion of the seventh or eight grade, enrolls in any high school other than the one in the child's home district, did not encroach on First Amendment religious freedom rights of parents of parochial high school students, since the association's interest in maintaining the transfer rule was strong, since encroachment upon religion was limited and, for most children, insignificant, and since the incidental impact it might have on a few was not sufficient to invalidate the rule on a religious freedom basis. U. S. C. A. Const.

Amend. 1.

6. Constitutional Law key 274(2)

State high school athletic association's "transfer rule," which restricts the eligibility of a child to compete in interscholastic high school athletic contests if the child, upon completion of the seventh or eighth grade, enrolls in any high school other than the one in the child's home district, was not violative of due process, since the rule is rational and bears a direct relationship to the results sought to be achieved, i. e., by a short-lived disqualification of eligibility, it effectively eliminates incentive both to recruit athletes and to be recruited. U. S. C. A. Const. Amend. 14.

7. Constitutional Law key 211(2)

In evaluating a claim that a difference in treatment violates the equal protection clause, the criteria to be considered are the character of the classification, the individual interests affected by it, and the governmental interests asserted in support of it. U. S. C. A. Const. Amend. 14.

8. Constitutional Law key 242.25(5)

State high school athletic association's "transfer rule" (which restricts the eligibility of a child to compete in interscholastic high school athletic contests if the child, upon completion of the seventh or eighth grade enrolls in any high school other than the one in the child's home district), denied equal protection to plaintiffs, parents of children who attended Lutheran parochial elementary schools and who wished to attend the only Lutheran high school avilable to them, a school not in their home district, since the transfer rule was applicable to Lutheran High and other private and public schools, but exempted four public schools with citywide attendance. U. S. C. A. Const. Amend. 14.

Talley, Anthony, Hughes & Knight, Charles M. Hughes, Bogalusa, La., for Louisiana High School and Lutheran High School.

Thomas L. Giraud, New Orleans, La., for Lutheran High School Assoc.

Gauche, Wegener & Oster, Robert J. Oster, Edmund T. Wegener, Jr., New Orleans, La., for Intervenor Etienne D' Arensbourg.

ALVIN B. RUBIN, District Judge:

This suit challenges the constitutionality of the "transfer rule", adopted by the Louisiana High School Athletic Association. That rule restricts the eligibility of a child to compete in inter-scholastic high school athletic contests if the child, upon completion of the seventh or eighth grade, enrolls in any high school other than the one in the child's home district. The constitutional challenge is to the rule as applied to children who have attended Lutheran parochial elementary schools and wish to attend the only Lutheran High School available to them, a school not in their home district. For the reasons set forth below, while the regulation withstands the constitutional attacks made on the basis that it encroaches on religious freedom and denies due process, it is unconstitutional because it denies the plaintiffs equal protection of the law; therefore it is hereby declared unenforceable.

The plaintiffs are the parents of children who are attending Lutheran High School. The defendants are both the Louisiana High School Athletic Association (LHSAA) 1/ and the Lutheran High School Association of Greater New Orleans, which

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1/ The association is a voluntary organization of Louisiana public, private and parochial high schools. It has no individual membership. Neither the principals, nor administrative officials nor coaches, nor students are

operates the Lutheran High School and is therefore sympathetically allied with the plaintiffs. Plaintiffs' children attended private elementary schools in New Orleans sponsored by Lutheran religious groups. In 1975 these children matriculated in Lutheran High School.

LHSAA, through the Lutheran High School Association of Greater New Orleans, ruled each of the plaintiffs' children ineligible to compete in inter-cholastic athletic competition for the school term 1975-76 because of provisions in the by-laws of the LHSAA (the "transfer rule").[2/] The claims with respect to these particular children became moot when that school year ended, but at least one subsequently added plaintiff has a child affected by the rule and some of the parents have other children who will likely be affected by it soon. Therefore, in a separate opinion dated September 20, 1976, the Court decided that the suit is not moot.

The "transfer rule", set forth in full in the footnotes,[3/] designates an attendance zone for each public high school in the

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1/ Continued
members. Each member high school is represented in the Association by its principal. Its purpose is to promote, regulate and direct the interscholastic athletic activity of member schools. To this end, it makes rules governing competitive athletic activities between its members.

2/ Rule 1 - No student who enrolls in one high school and later transfers to, or enrolls in another, shall be eligible to represent the latter school in any athletic contest.

3/ A student shall be considered as enrolled in a high school when he has enrolled and attended any class in that school. Attendance in any class constitutes enrollment.
EXCEPTION I-A student who has attended a one-, two-, or three year high school at the high school level may, upon completion of all grades offered by that school, become eligible at once to participate in athletics

state. No separate attendance zones are set for private or parochial high schools; each is considered to have the same attandance zone as the public high school that is located in the zone where its building is situated. To be eligible for interscholastic athletic competition, students who complete elementary school or junior high school must attend the high school located in the same attandance zone as their elementary school (or the high school in the zone where they reside), with certain exceptions created by the LHSAA or the parish school boards for special high schools.

The geographical attendance zone imposed on Lutheran High by LHSAA does not include any of the Lutheran elementary schools. Therefore, when a child completes any of the seven Lutheran elementary schools in the parish and, in order to continue his parochial education, matriculates in the Lutheran High School, he automatically loses one year of eligibility to compete in inter-scholastic athletics. All students in the 9th grade at Lutheran High School since its opening have therefore been ineligible to compete in inter-scholastic athletics for one year.

The transfer rule was adopted to prevent recruiting of school children by overzealous athletic coaches, fans, and school faculty. High schools, public and private, eager to enlist promising athletes, were urging students who would otherwise attend another school to change the school they would attend in order

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3/ Continued
upon transferring to a senior high school in his district.
A student may transfer upon the completion of the 7th or 8th grade to any high school in his home district and be eligible immediately.
EXCEPTION II - Any student after completing one year's attendance from date of enrollment in a high school, and fulfilling all other requirements, becomes eligible.

to enhance the quality of the teams at the recruiting school. Some alumni associations, athletic clubs, and even principals and coaches resorted to various expedients unrelated to educational goals to recruit promising student athletes. Therefore promising young athletics were being subjected to inducements to go to one school or another purely to enable the school to field a better team. This unwholesome situation was one of the main reasons that brought about the formation of LHSAA. All parties to this suit agree that this sort of recruiting of school children to engage in athletic competition may be considered harmful by the state, and that it may take steps to prevent this harm.

The LHSAA is a voluntary association of some 447 high schools in Louisiana, which regulates inter-scholastic athletic competition among the schools. Although membership in it is voluntary, a school must belong in order to compete with other schools; its activities, sanctioned by the state, constitute state action in the constitutional sense. ***Louisiana High School Athletic Association v. St. Augustine High School,*** 5 Cir. 1968, 396 F. 2d 224.

Four New Orleans Public schools are exempt, at least to some degree, from the transfer rule in Orleans Parish. Students from the entire parish are permitted to attend Ben Franklin High School, which limits enrollment to students who have demonstrated high achievement on entrance tests and above average grades in elementary school; parish-wide enrollment is also permitted in Booker T. Washington School, which has a vocational education curriculum; in McMain Magnet Senior High (except for a small area within the Fortier High School attendance district); and in McDonogh 35 School 4/ Because

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4/ McDonogh 35 High School has two curricula, one for "college preparatory" students and the other designated as the "normal" program. The former which has city-wide attendance in the college preparatory curriculum is permitted. See transcript, April 1, 1976, testimony of Carroll Breeland.

the school board permits students from other attendance zones to matriculate at these schools, the LHSAA has modified its rules to exempt them from the transfer rule.

There are some who dispute the desirability of competitive inter-scholastic athletics in high schools. The parties to this suit all consider such competition not only appropriate but desirable. Many students who value inter-scholastic athletics have either no interest in participation or lack the athletic ability to do so. Losing a year of varsity eligibility is meaningless to the young person who has no interest in intermural sports. But it may be significant to the youngster who desires to participate in high school athletics. The testimony in this case has established that athletic competition is important to some of the children of the plaintiffs. In addition, testimony was offered to show that students who achieve membership on school athletic teams enjoy higher peer goup esteem, may achieve better grades, and tend to be more self-reliant than other classmates. At the same time it must be recognized that these youngsters are usually 14 or 15 years old. They would be competing for places with older students, who are probably more developed. They may engage in intra-scholastic athletic activities and team training, but they are barred from inter-scholastic contests. They are thus deprived of a chance to develop their skills in a competitive context, of motivation to practice, and of the prestige of being a team member.

The state's interest must be weighed in the opposite side of the balance. The state has an interest in regulating inter-mural competition. The testimony offered by the LHSAA is persuasive that no plan of regulating recruiting is effective other than that of limiting the alternatives available to students. It is doubtful that case by case adjudication could effectively regulate the traffic in athletes. Individual inquiry on a case by case basis would involve a panoply of inquiry, hearing, and decision-making. If recruiting occurred, neither of the parties to the successful evasion of the regulations would complain, nor would

either be likely willingly to furnish evidence. The likely complainants would be opposing schools, which would have as little chance to prove their case as other prosecutors of consensual crimes. They would have no staff of investigators and no way to develop facts. Nor is any such staff available from any other source to investigate complaints. In addition, both the experience of the Association before the rule was adopted and the recurrent problems of collegiate regulation make it doubtful that the punishment of recruitment once it has occurred, even if later detected and proved, is sufficient to prevent recruitment. The time interval between enrollment of the 9th grade student in high school and his participation in an athletic event make it almost inevitable that the hearings to investigate whether or not illicit recruiting had taken place would occur after athletic events had taken place. Prophylaxis is not only more feasible than punishment; it may be the only effective way to deal with the problem. Hence as a pragmatic matter, the only feasible method is to adopt a clear, readily understandable and easily enforceable rule.

Plaintiffs claim the application of the "transfer rule" to them and their children violates their right to free exercise of religion guaranteed by the 1st and 14th Amendments to the Constitution of the United States because it discourages athletically talented and interested children from attending religious schools; they also contend that they are denied due process and equal protection on grounds more fully set forth below.

I. JURISDICTION

Section 1343 of the Judicial Code, 28 U.S.C. § 1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> * * * * * *

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States
>
> . . . . .

[1] The "right privilege or immunity" that is alleged to be abridged by the transfer rule is not the ability to engage in athletics; that issue would be raised only if the state barred athletic competition to all children who enter high school. If the state chose to eliminate inter-scholastic athletics, no substantial federal question would be raised because the privilege of participating in athletic competition per se is not protected by the due process clause. ***Mitchell v. Louisiana High School Athletic Association,*** 5th Cir. 1970, 430 F. 2d 1155. The issue here is whether, when the state permits children who attend some schools to engage in interscholastic athletics, it may deny that opportunity to those who attend a school selected for religious reasons. The substantial federal questions at issue are whether the state may abridge religious freedom by encroaching on an individual's practices in the performance of activities that do not per se enjoy constitutional protection,

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5/ The opinion in *Albach v. Odle*, 10th Cir. 1976, 531 F. 2d 983, confirms this criterion. It holds that an attack on a rule automatically barring from all inter-scholastic high school athletic competition for one year any student who transfers to a school or from a boarding school to his home district failed to raise a substantial federal question. In that case it was not alleged that the rule had any adverse impact on First Amendment rights. The court expressly said, ". . . [H]igh school athletic regulations must survive constitutional scrutiny."

and whether the manner that it has chosen violates the constitutional rights to equal protection and due process of the law.

II. THE RIGHT TO FREE EXERCISE OF RELIGION

[2] The right to free exercise of religion is guaranteed by the First Amendment to the Constitution of the United States. That buckler protects the right to attend religious schools instead of public institutions, not only as a form of religious exercise, but also because the Constitution implies a guarantee of liberty to parents and guardians that permits them to direct the education and rearing of children under their control. ***Pierce v. Society of Sisters***, 1925, 268 U. S. 510, 534, 45 S. Ct. 571, 573, 69 L. Ed. 1070. Compare ***Wisconsin v. Yoder***, 1972, 406 U. S. 205 at 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15.

In ***Gillette v. United States***, 1971, 401 U. S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168, the Supreme Court summed up the principles that guide decision:

> . . . [T]he Free Exercise Clause bars "governmental regulation of religious beliefs as such," ***Sherbert v. Verner***, 374 U. S. 398, 402, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965 (1963), or interference with the dissemination of religious ideas. See ***Fowler v. Rhode Island***, 345 U. S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953); ***Follett v. McCormick***, 321 U. S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944); ***Murdock v. Pennsylvania***, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943). It prohibits misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions, . . . even though the burden may be characterized as being only indirect." ***Braunfeld v. Brown***, 366 U. S. 599, at 607, 81 S. Ct. 1144, at 1148, 6 L. Ed. 2d 563 (opinion of Warren, C. J.). And even as to neutral

> prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims.

401 U. S., at 462, 91 S. Ct. at 842.

The challenged transfer rule is a neutral regulation with secular objectives. The court's function is to determine whether in this instance "the burden on First Amendment values is justifiable in terms of the [Association's] valid aims." It is not enough that the transfer rule is appropriate to achieve a valid secular end; the value to society must be measured in some way against the impediment to which the regulation subjects those whose practices are affected by it. See concurring opinion of Mr. Justice Frankfurter, in *McGowan v. Maryland*, 1901, 366 U. S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393. The transfer rule permits the continuation of religious education at a price: forfeiture of a year of athletic participation upon entry into high school. The issue is whether the price is more than the state may exact.

There is no standard of constitutional wieght and measures by which to test the scales. If a person whose religious beliefs forbid her to work on Saturday must forfeit, by her refusal to do so, unemployment compensation benefits otherwise due, such regulation unfairly burdens her free exercise of religion by compelling her to choose between the principles of her faith and the governmental benefits available to others. ***Sherbert v. Verner***, 1963, 374 U. S. 398, 83 S. Ct. 1970, 10 L. Ed. 2d. 965 6/

6/ The principles of *Sherbert v. Verner, supra*, control decision here. The result is different because the encroachment is not in my opinion

On the other hand, a person whose religious beliefs cause him to object conscientiously to certain wars but not to all may be reqired to participate in what he sincerely considers an unjust one or go to jail. ***Gillette v. United States,*** supra. A person whose religious beliefs make him a conscientious objector and cause him to choose civilian service may be denied educational benefits given to those who engage in more onerous or lengthy military service, ***Johnson v. Robison***, 1974, 415 U. S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389; a female less than eighteen years of age may be prohibited from selling periodicals in a public place despite the fact that, as a Jehovah's Witness, she

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6/Continued
substantial, and the government interest is compelling both because it regulates an action that requires governmental intervention and does so on the only practicable fashion.
In *Sherbert v. Verner*, the court refused to overrule *Braunfeld v. Brown*, supra (in which a Sunday closing law was held constitutional despite its impact on an Orthodox Jew). In its opinion, written by Mr. Justice Brennan, the Court first found that the South Carolina statute put a burden on the plaintiff's free exercise of religion. It next considered "whether some compelling state interest" justified the "substantial infringement of appellant's First Amendment right." 374 U. S. at 406, 83 S. Ct. at 1795. (Emphasis supplied). Implicit in its analysis is an evaluation of the degree of encroachment that results from state action [e. g., is it minor? Is it substantial? Does it affect a fundamental tenet of the plaintiff's faith? Does it touch a lesser precept?]; the court then made a separate appraisal of the importance to the state of the ends sought to be achieved [Is the state interest compelling?] and whether any less intrusive means might have been chosen Finding both that there was no compelling state interest in requiring employees to work on their Sabbath, and that the statute was not necessary to achieve the purposes professed (e. g. to prevent the filing of fraudulent claims for unemployment benefits), the court held it unconstitutional. It distinguished *Braunfeld v. Brown*,supra, on the basis Sunday closing laws were adopted because of a "strong state interest in providing one uniform day of rest for all workers." 374 U. S. at 408, 83 S. Ct. at 1796.

believes it is her religious duty to perform this work, *Prince v. Commonwealth of Massachusetts*, 1944, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; and Orthodox Jews may be required to close their businesses on Sunday even though they observe the Sabbath on the Seventh Day, *Braunfeld v. Brown*, 1961, 366 U. S. 99, 81 S. Ct. 1144, 6 L. Ed. 2d 563.

Even more direct encroachment on religious beliefs is permitted when the governmental interest is stronger; thus a Mormon who takes more than one wife in accordance with a duty imposed upon him by the precepts of the Church of Jesus Christ of the Latter Day Saints may be jailed for polygamy. *Reynolds v. United States*, 1878, 98 U. S. 145, 25 L. Ed. 244.

[3] The measure that must be employed is not one of equal balance. In this area, balanced scales weigh against government regulation. The state must have a compelling interest in the regulation in question, *Johnson v. Robison*, supra, 415 U. S. at 384, 385, 94 S. Ct. at 1175, and there must be no equally effective alternative means to achieve the state's objective. *Cantwell v. Connecticut*, 1940, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, and other cases cited by the Justice Frankfurter in his concurrence in *McGowan v. State of Maryland, supra, 366 U. S.* at 464, 81 S. Ct. at 1155. These precepts were reiterated in *Wisconsin v. Yoder:*

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

1972, 406 U. S. 205, 214, 92 S. Ct. 1526, 1532.

Where secular regulatory statutes of a state affect religious

observance in some way, they have been challenged in a host of cases. Appendix A contains an excerpt from Dorsen, Bender, and Neuborne, Political and Civil Rights in the United States, 4th Edition, vol. 1., pp. 1257-1263, citing and discussing cases that have considered the constitutional conflict with religious beliefs or observances alleged to be created by compulsory vaccination laws; involuntary blood transfusions; other medical treatment; prohibition of the use of psychedelic drugs; requirements relative to appearance in judicial proceedings; building and zoning laws; taxation of institutions alleged to be religious; and the prohibition of fortune-telling, of use of alcoholic beverages, of snake-handling and of fluoridation. Where the state has adopted a general regulation with a secular purpose, the magnitude of the state interest must be weighed against the extent of the encroachment on the religious observance or belief that is incidentally affected.

Thus, a state may be required, even in operating a prison, to make pork-free food available to a person whose religious beliefs forbid him to partake of swine, ***Barnett v. Rodgers,*** 1969, 133 U. S. App. D. C. 296, 410 F. 2d 995; the state has little affirmative interest in what kind of food prisoners eat, and it is no great problem to prepare alternative diets. The rule presumably would be different if the prisoner's religion mandated him to eat the tongues of hummingbirds and drink the milk of paradise. A state may be forbidden to compel public school attendance beyond the eighth grade where strong religious beliefs forbid it; weighed in this determination is the judgment that an eighth grade education is at least minimally sufficient to permit participation in a democratic society and that further non-institutional education would be provided ***Wisconsin v. Yonder,*** supra. The result would likely be different if the parent religious tenets required illiteracy and forbade all school atten-

dance.7/

The impact of the regulation on the plaintiffs has been minimal.8/ The transflaw was held constitutional despite its imer rule has not been shown to have prevented any parent

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7/ At least some cases have raised a doubt as to whether it would be constitutional to require a state agency to adjust its requirements to accommodate religious beliefs. A federal statute requires private employees reasonably to accommodate an employee's religious beliefs. See 42 U. S. C. A. § 2000e(j), as amended in 1972. Its constitutionality was upheld in *Hardison v. Trans World Airlines*, 8th Cir. 1975, 527 F. 2d 33. In a Comment, Title VII, Religious Discrimination, 9 ¶ Creighton Law Review 795, 804 (1976) the author observes:

> The Establishment Clause creates problems with this analysis, however, the promotion of a particular religion, or of any religion, is not a justifiable ground for legislation. Under the test announced by the Supreme Court in *Nyquist, [Committee for Public Education and Religious Liberty v. Nyquist* 1973, 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948], a law must have a "primary effect that neither advances nor inhibits religion." The first amendment guarantees neutrality in its religion clause. There can be little doubt that Congress enacted Title VII with secular goals in mind. However, the Act as amended in 1972 defines religion so as to require that certain persons receive preferential treatment because of their religion. Cummins [*Cummins v. Parker Seal Co.*, 6th Cir. 1975, 516 F. 2d 544] suggests that it is a valid purpose of the Act to grant preferences to persons whose religious practices do not conform with the religious practices of the majority. Certain persons will not compromise their religious convictions and they should not be penalized for not doing so. However, some argue that by reasonably accommodating an employee's religious belief a priority of the religious over the secular develops.

8/ The record was reopened by the court on its own motion to consider evidence concerning the effect of the transfer rule on the plaintiff and their children, and other matters. One parent testified that she has a son in elementary school who is athletically inclined; she is "concerned"

from sending his child to Lutheran High or any child from attending it. Nor has it been shown to have has a significant impact on religious observance in any way.

[4] A statute or state regulation may be invalid because it inhibits First Amendment rights even when it does not preclude them, because of what has been appropriately called its chilling effect on the exercise of those rights. But in his case no serious inhibition either of parents or children has been shown. Even if the desire of some children, or their parents, to pursue a Lutheran education has been abated or chilled, the state interest in this regulation appears strong enough to justify it. It has already been observed that, in the present case, all agree - since all are interested in athletics - that, if inter-scholastic athletics are to continue and are to be conducted on an ethical basis, the Association must regulate recruiting. No other feasible means of regulation has been indicated. The plaintiffs have suggested sanctions against individuals who engage in recruiting or students who succumb to it. For reasons

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8/ Continued

about his willingness to attend Lutheran High if he cannot participate in competition sports his first year. Her older son attended another private school for reasons unrelated to the transfer rule. Her older daughter attended Lutheran High; she was disappointed that she could not participate in inter-scholastic sports but her inability to do so did not sway her acquiescence in her mother's decision to enroll her in Lutheran High.

A father of four, who is also a Lutheran School principal, has two children in Lutheran High School and two in other Lutheran schools. His children will attend Lutheran schools regardless of the transfer rule. Another father of two, both in Lutheran elementary schools, sends his children to Lutheran schools because of his religious beliefs and the mandate of the Bible; his children will attend Lutheran High School when they reach that stage of their education. A father of three children, whose wife is of the Lutheran faith, sends his children to Lutheran schools for a Christian education; he is a Christian but not a Lutheran; the transfer rule has not deterred two of his children from attending Lutheran schools.

already set forth, this is not effective; indeed it was tried unsuccessfully in Orleans Parish some years ago. The only other suggestion was that the Association adopt some set of different attendance zones to apply to private and parochial schools. The testimony indicated that this was an unsatisfactory solution and might create other due process or equal protection problems. While there is only one Lutheran High School, and it considers its natural attendance area to be parish wide, at least one other faith sponsors several high schools, each of which considers its attendance area to be parish wide. In addition a large portion of the children who attend Lutheran High are not of the Lutheran faith; presumably these children would be treated differently from Lutheran children if geographic zoning were adopted. If there is an alternative that is workable, its feasibility has not been shown.

[5] The Association's interest in maintaining the transfer rule is therefore strong. The encroachment upon religion is limited, and, for most children (the non-athletes), insignificant. The incidental impact it may have on a few is not sufficient to invalidate the rule on this basis.9/

III. DUE PROCESS

[6] There is no substantial due process issue in this case. The transfer rule is rational and bears a direct relationship to the result sought to be achieved: if effectively eliminates incentive both to recruit and to be recruited by a short-lived disqual-

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9/ State impact on First Amendment rights is not in my opinion justified by showing merely a rational relationship to a legitimate state interest although the Louisiana Supreme Court did apply this test in determining the constitutionality of the transfer rule, *Chabert v. Louisiana High School Athletic Association*, 1975, 323 So. 2d 774, 779, Nevertheless for the reasons set forth in this opinion, I agree with the conclusion the court reached on the first Amendment issue.

ification. All that rationality in this context requires is that the rule bear a logical relationship to its objective and have a reasonable likehood of accomplishing it. Nor does the rule create any presumptions, irrebuttable or otherwise. The rule is merely prophylactic and its purpose is not to define the situations in which recruiting occurs, but rather to deter improper recruiting by means of a broadly sweeping rule. ***Mourning v. Family Services Publications Service***, 1973, 411 U. S. 356, 377, 93 S. Ct. 1652, 1664, 36 L. Ed. 2d 318. There is no pretense that the transfer rule determines the true intent of matriculating students, while making relevant evidence of intent inadmissible in an adjudication. ***Weinberger v. Salfi***, 1975, 422 U. S. 749, 95 S. Ct. 2457, at 2470, 45 L. Ed. 2d 522. Moreover, there is in this case no chilling of the plaintiffs' constitutionally protected rights to choose religious education. All that need be shown, therefore, is that the legislature chose "an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility." ***Weinberger v. Salfi***, supra, 95 S. Ct. at 2470. The transfer rule applies an objective standard to all 9th graders, whether in public or religious schools, and whether or not they seek to engage in inter-scholastic competition. The mere fact that some, or even most, of the 9th graders affected by the rule would not otherwise be recruited does not make the rule constitutionally infirm. The rule's reach may be broader than its aim. ***Williamson v. Lee Optical of Oklahoma***, 1955, 343 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563, reh. den. 349 U. S. 925, 75 S. Ct. 657, 99 L. Ed. 1256.

IV. EQUAL PROTECTION

[7] As has already been pointed out, the transfer rule applies to Lutheran High (and other private and public schools), but exempts four public schools with city-wide attendance, Ben Franklin, McDonogh 35, McMain Magnet, and Booker T.

Washington. In evaluating the claim that this difference in treatment violates the Equal Protection Clause, the criteria to be considered are: (1) The character of the classification in question; (2) the individual interests affected by it; and (3) the governmental interests asserted in support of it. ***Dunn v. Blumstein***, 1972, 405 U. S. 330, 335, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274. See also ***Brenden v. Independent School District***, 8th Cir. 1973, 477 F. 2d 1292.

[8] Here most public schools and all private schools are in one class, and students who enroll in them are treated one way; some public schools, (the four already named) are in another class, and their 9th grade students are treated differently. The evidence does not afford any satisfactory explanation concerning the rationale behind drawing this distinction or the governmental interest if any, that would support it.

With respect particularly to Lutheran High School, the LHSAA has shown no logical reason why it should be subject to a rule from which the four public schools are exempt. It is said that a youngster entering the 9th grade cannot merely choose to attend Ben Franklin; he must attain eligibility, But, assuming eligibility, he may attend for the same athletic competitive reasons that might encourage his Lutheran peer, 10/ to attend Lutheran High. Without special eligibility, any child

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10/ Of the 233 children attending the Lutheran High School, 73% profess the Lutheran faith. See also Edwards and Kapan, Religious Discrimination and the Roll of Arbitration under Title VII, 1971, 69 Mich. L. Rev. 599, 628:

> Who is to say that the desire to stay at home Sunday and do nothing is any less worthy of protection than is the need to attend church that same day? But the EEOC's standard clearly chooses the one over the other. In so doing, it misconceives not only Title VII but the delicate balance between the free exercise of religion and the operation of a secular society.

To state these views is not necessarily to adopt them.

may attend Booker T. Washington if he elects a vocational education, whatever grade school he has completed, and may then immediately engage in athletic competition; similar voluntary area-wide enrollment is permitted in McDonogh 35 and McMain Magnet without loss of eligibility.

If the evil sought to be prohibited by the transfer rule is threatened to be brought about by children who may be recruited for athletics at Lutheran High (total enrollment 233; ninth grade enrollment 74), then it is obviously more likely to be present when a decision is made by a child and his parents that he will attend Booker T. Washington (enrollment 2016; ninth grade 366) or Ben Franklin (enrollment 752; ninth grade 203.) 11/ The only justification presented in the testimony for the distinction between the public area-wide schools and Lutheran High is that recruiting has never been a problem in these four schools. However, according to the same witness, neither has recruiting been a problem in the Lutheran Schools.

The equal protection clause, as it applies here is not complex. There is no need to consider whether the differences in treatment of the Lutheran Schools and the four public schools with city-wide attendance creates a suspect classification justifying strict scrutiny. See *Village of Arlington Heights Metropolitan Housing Development Corp.*, 1977 —U. S. —, 97 S. Ct. 555, 50 L. Ed. 2d 450. The Court's holding is not founded on the religious character of the plaintiff school because the transfer rule applies alike to all private schools, whether or not they are supported by members of a religious faith. It fails to pass equal protection muster by a less demand-

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11/These figures, accurate as of October 6, 1976, were obtained from the Public Information Office of the Orleans Parish School Board and from plaintiffs' counsel. The court was unable to find the figures in the record.

ing standard: the division into classes must bear at least some rational relationship to the end sought to be achieved. ***Williamson v. Lee Optical of Oklahoma***, 1955, 343 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563, reh. den. 349 U. S. 925, 75 S. Ct. 657, 99 L. Ed. 1256. The distinction between Lutheran High on the one hand and the four public schools on the other appears to be based on no consideration that has any logical relationship to athletic recruiting.

For these reasons, the transfer rule, as drawn in Orleans Parish denies the plaintiffs equal protection of the laws and is declared unconstitutional.

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FILED
DEC 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CATHERINE WALSH, WIDOW OF RUSSELL A. MIERL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER MINOR CHILD, EDITH MIERL, ET ALS.,
Petitioner,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION AND LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Respondents respectfully submit to the Court that, in addition to those questions listed by petitioners, the petition for certiorari in this case also raises the following questions:

1. Was the petition for a writ of certiorari filed untimely?
2. Is the privilege of participating in interscholastic athletics and in particular a student's interest in participating in a single year of interscholastic athletics an interest that is protected by the due process clause of the Fourteenth Amendment?

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No. 80-584

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CATHERINE WALSH, widow of Russell A. Mierl,
Individually and as Administratrix of the
Estate of her minor child,
EDITH MIERL, et als.,
Petitioner,

versus

LOUISIANA HIGH SCHOOL ATHLETIC
ASSOCIATION AND LUTHERAN HIGH SCHOOL
ASSOCIATION OF GREATER NEW ORLEANS,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION

MAY IT PLEASE THE COURT:

Defendant-respondent, Louisiana High School Athletic Association, submits this brief in opposition to

the plaintiffs-applicants' petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit and respectfully submits that the writ should be denied for the reasons set forth below. This brief in opposition is submitted in accordance with the Court's request that a response be filed in this case on or before January 3, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152 (5th Cir. 1980). The opinion of the District Court is reported as *Walsh v. Louisiana High School Athletic Association*, 428 F.Supp. 1261 (E.D. La. 1977).

JURISDICTION

Contrary to the statement of jurisdiction in plaintiffs' petition for a writ of certiorari, the judgment of the United States Court of Appeals was entered on April 30, 1980 and not on July 7, 1980 as stated in the petition for certiorari. Plaintiffs-petitioners' petition for rehearing and rehearing *en banc* was denied by order of the United States Court of Appeals for the Fifth Circuit on June 23, 1980. The petition for certiorari in this case was filed more than ninety days after the denial of the petition for rehearing and is therefore untimely. Accordingly, this Court is without jurisdiction to con-

sider said petition. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision cited by plaintiffs in their petition for certiorari, respondent does cite to the Court the following statutory provision:

> "Any other appeal or writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." 28 U.S.C. §1201(c).

STATEMENT OF THE CASE

Plaintiffs originally brought this suit for a declaratory judgment in the United States District Court for the Eastern District of Louisiana to challenge on constitutional grounds the application of the defendant's "transfer rule" to their children. The defendant, Louisiana High School Athletic Association (hereinafter LHSAA) is a voluntary Association of public,

private and parochial high schools within the State of Louisiana. The purpose of the LHSAA is to promote, regulate and direct the interscholastic athletic activities of its member schools and, in order to accomplish said purpose, the Association makes the rules governing competitive athletic activity between its members. One of the most serious problems facing the LHSAA is the illegal recruiting of promising young athletes as they matriculate from elementary school or junior high school into high school. The LHSAA is a member of the National Federation of State High School Associations, which is a national organization that has recognized the evils of recruiting promising young athletes to attend high school solely for the purpose of participating in athletics. The fact that this type of recruitment is an evil which the Association has a right to prevent was recognized by the plaintiff at trial and was recognized by both the District Court and the Court of Appeals. Plaintiffs, however, challenged the Association's method of deterring recruitment as applied to their children and not the Association's right to try to prevent it.

The Association's primary deterrent to recruitment is the "transfer rule". This rule assigns geographical home districts to each of its member high schools. If a student transfers to a high school outside of his geographical area, then he is ineligible under the rule to participate in interscholastic athletic competition for a period of one year. The plaintiffs' minor children elected to attend Lutheran High School, a school outside of

their home geographical district and outside of the geographical district of elementary schools which they attended. One of the bases of plaintiffs' claim that the rule is unconstitutional is that, since Lutheran High School is a religious school, to apply the rule to them infringes upon their right to the free exercise of religion.

It should be noted here that the rule does not prevent anyone from practicing the Lutheran faith. It does not prevent anyone from attending Lutheran High School. It does not prevent anyone from attending Lutheran High School and studying religion or any other subject including athletics. Under this rule, the students may take athletics at Lutheran High School and may participate in practices with the varsity athletic teams. The rule simply prevents the students who transfer out of their home district from participating in athletic contests between Lutheran High School and other high schools for a period of one year. At the end of this one-year period, these students who have transferred to Lutheran High School may participate in interscholastic athletic competition. In addition to their freedom of religion claim, plaintiffs claim a denial of due process and equal protection. The Trial Judge rendered a written opinion wherein he rejected plaintiffs' freedom of religion claim. He also rejected their claim that the rule denied them both substantive and procedural due process of law. The District Court also held that the transfer rule as generally applied throughout Louisiana did not violate the equal protection clause of the Fourteenth Amendment. However,

because of what the Court deemed to be certain exceptions to the rule allowed in Orleans Parish, it held that plaintiffs who lived in Orleans Parish were denied equal protection of the law and declared the transfer rule as applied in Orleans Parish unconstitutional.

This latter fact is important because some of the plaintiffs to this declaratory action were residents of Jefferson Parish. As to the plaintiffs who were residents of Jefferson Parish, the Trial Court did not grant any relief, and they did not appeal its decision. Therefore, as to those plaintiffs, the decision of the Trial Court is final.

Defendant, LHSAA, appealed the Trial Court's decision that its rule as applied in Orleans Parish was unconstitutional. The Fifth Circuit's opinion in this case affirms the Trial Judge's decision that the application of the rule to plaintiffs was not a denial of the right to freedom of religion or the right to substantive or procedural due process of law. The Fifth Circuit also affirmed the decision that the rule as generally applied did not violate equal protection of the law and reversed the Trial Court's decision that, as applied in Orleans Parish, the rule was a denial of equal protection.

REASONS FOR NOT GRANTING WRIT

Respondent submits this is not a proper case for granting a writ of certiorari for the following reasons:

1. The petition for a writ of certiorari was filed untimely and therefore this Court is without jurisdiction to grant the writ.

2. The decision of the Court of Appeals (except on the issue of the existence of federal jurisdiction) is correct on the merits.

3. The decision of the Court of Appeal is not in conflict with any applicable decision of this Court and is in fact in accord with all applicable decisions of this Court.

4. The decision is in accord with the decisions of other Federal Courts of Appeal on the same subject matter.

5. The decision of the Court of Appeal is in accord with a decision of the Louisiana Supreme Court (the State Court of last resort) on the same subject matter.

ARGUMENT IN OPPOSITION TO GRANTING WRITS

The petition for a writ of certiorari was filed untimely. The opinion of the Court of Appeals for the Fifth Circuit was handed down on April 30, 1980 and judgment was entered the same day. Plaintiffs timely filed a petition for rehearing and rehearing *en banc*. Rehearing was denied on June 23, 1980. Under the provisions of 28 U.S.C. §1201(c) plaintiffs had ninety days from June 23, 1980 in which to petition this Honorable

Court for a writ of certiorari. Therefore, the last day for plaintiffs to petition this Court for a writ of certiorari was September 21, 1980. The petition for a writ of certiorari was filed on October 6, 1980. There is no contention in this case that an extension was sought or granted. To the contrary, plaintiffs contend that their application was filed timely based upon the assertion in their petition for writs that judgment was entered by the Court of Appeals on July 7, 1980. The author of this brief has no knowledge of any facts upon which such a contention can be made. In fact, undersigned counsel has checked with the clerk's office of the Fifth Circuit Court of Appeals and has been informed that the minutes of the docket of that Court show that no action was taken in this matter on July 7, 1980. He has also been informed that the date of entry of judgment in this matter was April 30, 1980. Rule 36 of the Federal Rules of Appellate Procedure would require that the date of entry of judgment in this case be April 30, 1980. The undersigned counsel obtained from the clerk's office of the United States Court of Appeals certified copies of the judgment dated April 30, 1980 and the order denying the petition for rehearing dated June 23, 1980, which certified copies are reprinted as an appendix to this brief.

Since the petition for a writ of certiorari in this case was filed untimely, this Court is without jurisdiction to consider said petition. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418, 67 L.Ed. 719, 43 S.Ct. 458 (1923); *Federal Trade Commission v. Minneapolis-Honeywell Regulator*

Company, 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952); *Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 87 L.Ed. 1483, 63 S.Ct. 1126 (1943); *Department of Banking v. Pink*, 317 U.S. 264, 87 L.Ed. 254, 63 S.Ct. 233 (1942); *Citizens' Bank v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919); *See also*, Justice Harlan's concurring opinion in *Schacht v. United States*, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970).

It is also respectfully submitted that the writs should be denied in this case because of a lack of federal question jurisdiction. As recognized by the Court of Appeal in its decision, there remains some interests that are outside the scope of constitutional protection. *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 159 (1980). It has been consistently held that suits by student athletes challenging high school athletic association rules or NCAA rules do not present substantial federal question. *Wiley v. National Collegiate Athletic Association*, 612 F.2d 473 (1979) cert. denied ____ U.S. ____, ____ S.Ct. ____, 64 L.Ed.2d 798 (1980); and cases cited therein.

The writ in this case should also be denied because the decision of the Court of Appeals is in accord with the applicable decisions of this Court. On the issue of freedom of religion, petitioners cite *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) as authority for granting the writ and reversing the decision of the Fifth Circuit. However, both the District Court and the Court of Appeals relied upon *Yoder* to re-

ject plaintiffs' freedom of religion claim. Both courts correctly applied the test laid down in *Yoder* for determining whether or not a statute or regulation is invalid as an infringement on the free exercise of religion.

The Court of Appeals also followed the applicable decisions of this Court on the due process and equal protection issues. *See, Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); *Paraham v. Hughes,* 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) and other cases on these issues cited at 616 F.2d 159-160.

In addition, the writ should be denied in this case because the decision of the Court of Appeals for the Fifth Circuit is in accord with the decisions of other federal courts of appeals on the same subject matter. *Wiley v. National Collegiate Athletic Association,* 612 F.2d 473 (10th Cir. 1979) cert. denied ____ U.S. ____, ____ S.Ct. ____, 64 L.Ed.2d 798 (1980); *Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 F.2d 128 (3rd Cir. 1978); *Dennis J. O'Connel High School v. Virginia High School League,* 581 F.2d 81 (4th Cir. 1978); *Hamilton v. Tennessee Secondary Athletic Association,* 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976); and *Oklahoma High School Athletic Association v. Bray,* 321 F.2d 269 (10th Cir. 1963).

The decision of the Court of Appeals in this case is in accord with previous decisions by the Fifth Circuit on

the validity of rules regulating high school and collegiate athletics. *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970); *Parish v. The National Collegiate Athletic Association*, 506 F.2d 1028 (5th Cir. 1975).

The decision of the Court of Appeals in this case is also in accord with the decision of the Louisiana Supreme Court (the state court of last resort) on the same subject matter. *Chabert v. Louisiana High School Athletic Association*, 323 So.2d 774 (1975).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied or dismissed as being untimely. In the alternative, it is respectfully submitted that the petition for a writ of certiorari should be dismissed because this case does not present the Court with federal question jurisdiction, and in the further alternative, it is respectfully submitted that the writ should be denied because the decision below is correct and in accord with the applicable decisions of this Honorable Court and the decisions of the other courts of appeals.

Respectfully submitted:

Charles M. Hughes
TALIEY, ANTHONY, HUGHES
& KNIGHT

322 Columbia Street
Bogalusa, Louisiana 70427
(504) 732-7151
ATTORNEY OF RECORD FOR
DEFENDANT-RESPONDENT
LOUISIANA HIGH SCHOOL
ATHLETIC ASSOCIATION

CERTIFICATE

I hereby certify that three copies of the foregoing Brief have this day been delivered to Mr. Edmund T. Wegener, Jr., Attorney at Law, 135 St. Charles Avenue, Suite 1006, New Orleans, Louisiana 70130, and Mr. Thomas Giraud, Attorney at Law, 610 Poydras Avenue, New Orleans, Louisiana 70130 by placing copies of same in the U.S. Mail, postage prepaid.

Bogalusa, Louisiana, this ____ day of December, 1980.

Charles M. Hughes

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET AL.,
Plaintiffs-Appellees,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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I, Gilbert F. Ganucheau, Clerk of the U.S. Court of Appeals for the Fifth Circuit, do hereby certify that the attached pages numbered from 1 to 2 contain a full, true and complete copy of the following documents:

1. Judgment dated April 30, 1980

2. Order denying Petition for Rehearing, June 23, 1980

In the above case in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date:

GILBERT F. GANUCHEAU,
Clerk of the United States Court
of Appeals for the Fifth Circuit.

/s/ Mary S. Stram
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET. AL.,
Plaintiffs-Appellees,

versus CA-75-2458 "C"

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

April 30, 1980

ISSUED AS MANDATE: July 1, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET. AL.,
Plaintiffs-Appellees,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion 4/30/80, 5 Cir., 197__, ____ F.2d ____).

(June 23, 1980)

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge